Supreme Court, U. S.
FILED
JUL 28 1976

No. 76-121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

SCOTT PAPER COMPANY, *Petitioner*,

v.

ELIGH WATKINS, *et al.*, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN VANDERSTAR
JOHN R. BOLTON
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006
Tel: (202) 452-6072
Attorneys for Petitioner
Scott Paper Company

Of Counsel:

FRANK McRIGHT
McRIGHT & SIMS
508 Commerce Building
Mobile, Alabama 36601

NORMAN H. HEISMAN
JOHN E. ABODEELY
VERONICE A. HOLT
Scott Paper Company
Philadelphia, Pennsylvania

July 28, 1976

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND EXECUTIVE ORDER INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	15

TABLE OF AUTHORITIES

CASES:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 7, 9, 11, 12

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 13, 14

NAACP v. *FPC*, 48 L.Ed.2d 289 (1976) 9

U.S. Steel Corp. v. *Ford*, No. 75-1475, petition for certiorari filed April 13, 1976 12

United States v. *Local 189*, 282 F. Supp. 39 (E.D. La. 1968), 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) 3, 4

United States v. *Local 189*, 301 F. Supp. 906 (E.D. La. 1969) 4

United Steelworkers of America v. *Ford*, No. 75-1478, petition for certiorari filed April 13, 1976 12

Page

STATUTES AND EXECUTIVE ORDERS:

Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e *et seq.* ..... *passim*

Section 703(a), 42 U.S.C. § 2000e-2(a) 2
Section 703(h), 42 U.S.C. § 2000e-2(h) 2
Section 703(j), 42 U.S.C. § 2000e-2(j) 2
Section 706(b), 42 U.S.C. § 2000e-5(b) 2
Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) .. 2
Section 706(g), 42 U.S.C. § 2000e-5(g) 2

Executive Order 11,246 (1965) 2, 12

Executive Order 11,375 (1967) 4

41 C.F.R. Part 1-12.8 4

MISCELLANEOUS:

EEOC, "Affirmative Action and Equal Employment—A guidebook for employers" (1974) 10

Hearings on S. 2515 *et al.* Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 82d Cong., 1st Sess. (1971) 4, 8

Legislative History of the Equal Employment Opportunity Act of 1972; Committee Print of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. (1972) 8

Northrup, THE NEGRO IN THE PAPER INDUSTRY (1969) 3

Note, *Civil Rights: Private Cause of Action Exists Under Title VII Notwithstanding EEOC Determination of No Reasonable Cause,* 1971 Duke L.J. 467 (1971) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

SCOTT PAPER COMPANY, *Petitioner,*

v.

ELIGH WATKINS, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Scott Paper Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on April 29, 1976.

OPINIONS BELOW

The opinion of the court of appeals is reported at 530 F.2d 1159 (5th Cir. 1976). The opinion of the District Court is reported at 6 Employment Practices Decisions ¶ 8912 (S.D. Ala. 1973). The opinions are reproduced as Appendices A and B, respectively, bound separately, and filed together with this Petition.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND EXECUTIVE ORDERS INVOLVED

Sections 703(a),(h) and (j), and 706(b),(f)(1) and (g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a),(h) and (j), and 2000e-5(b),(f)(1) and (g), are set forth in Appendix C to this Petition. Executive Order 11,246, 30 Fed. Reg. 12319 (September 24, 1965), is set forth in Appendix D to this Petition. The Appendices are bound separately and filed together with this Petition.

QUESTION PRESENTED

Where an employer has attempted to eliminate the present effects of past discrimination by adopting a specific set of rules required by a Federal agency charged with enforcing equal employment laws, and where it is later held that those Government-sponsored rules do not comply with Title VII, would it frustrate the central statutory purposes of Title VII if a district court were permitted to consider the Government involvement and employer reliance in passing upon a claim for class-wide back pay?

STATEMENT OF THE CASE

Petitioner Scott Paper Company was a defendant in this action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Respondents, a class composed of all black employees at Scott's pulp and paper mill in Mobile, Alabama, were the plaintiffs. Co-defendants with Scott were the

labor unions that represented most hourly employees at the mill. (A. 1, 73-74)

Respondents did not contend at trial that the rules and procedures which governed transfers and promotions in hourly production jobs presently discriminate against Scott's black employees. Those rules and procedures were part of a seniority system that was neutral on its face.[1] (A. 2, 74-75)

The principal focus at trial, instead, was on a plan Scott adopted, at Government insistence, in 1968-69, to eliminate the present effects of pre-Act discrimination. The plan made several modifications in the transfer and promotion system in order to speed black employees to their "rightful place"—the job levels they could have attained had there never been racial discrimination at the mill—while still permitting safe and efficient mill operation. (A. 4-5, 75-76)

This plan reflected a new principle in Federal equal employment law, *viz.*, that an employer must not only abandon discriminatory practices and follow a neutral seniority system but must also adopt new seniority and other rules designed to eliminate continuing effects of the previous discrimination.

The affirmative action principle was first applied in the paper industry in March of 1968 in *United States* v. *Local 189*, 282 F. Supp. 39 (E.D. La.), a Title VII case brought by the Department of Justice and joined by private plaintiffs. The principle had been advanced

---

[1] Indeed, Scott was cited in a 1969 study by the University of Pennsylvania's Wharton School as "a leader in minority integration in the industry" and as having "justly acquired the reputation as *the* place to apply for work in the Negro community." Northrup, THE NEGRO IN THE PAPER INDUSTRY, 110, 111 (1969) (emphasis in the original).

earlier by the Office of Federal Contract Compliance (OFCC), the agency in the Department of Labor responsible for overseeing compliance with Executive Orders that require affirmative-action promises from employers who contract with the Federal Government.[2] As stated by Under Secretary of Labor Laurence H. Silberman, "[t]he affirmative action obligation is a higher standard than mere passive nondiscrimination."[3] Previously, the Equal Employment Opportunity Commission (EEOC), the agency established by Title VII to oversee compliance with that law, had approved the establishment of a neutral seniority system upon the abolition of prior discriminatory practices.[4]

Promptly after the *Local 189* decision, OFCC began insisting that other Southern paper companies adopt the *Local 189* decree as the most appropriate balance between the objectives of eliminating present effects of past discrimination and preserving safe and efficient operation. International Paper Company, the South's largest, agreed at OFCC's insistence to a "Memorandum of Understanding" in August 1968. Scott had been notified in May 1968 that it must adopt a similar affirmative plan or face possible loss of Government contracts, and agreement on details was reached in November of that year. Thereafter, the union local which then represented all of Scott's black employees[5] ratified the Memorandum of Understanding. The then-white locals did not ratify the Memorandum (one voted it down), but Scott put it into effect in May 1969. (A. 89-90, 91-92)

The Memorandum identified, and gave special rights to, an "affected class" (ACs), consisting of all black employees hired on or before a specified date and all black employees hired after that date and initially placed in jobs or lines of progression that had formerly been all-black.[6] Of Scott's 500 black employees in 1969, only 300 were designated as ACs, and over one-third of these were already in jobs that had formerly been all-white. Thus, over 300 of Scott's 500 black employees were not, in 1969, in jobs from which blacks had historically been barred. (A. 91)

In its essence, the Memorandum contained the following plan for speeding ACs' progress while not endangering safe and efficient operation: On the one hand, ACs were to be entitled to transfer and receive promotions based on their mill seniority, instead of contract (job or department) seniority, in competing with non-ACs. On the other hand, Scott could continue to promote and transfer only qualified individuals, except that the qualifications needed by ACs to

---

[2] The Executive Order then in effect was No. 11,246, adopted September 24, 1965. It has since been amended by Order 11,375. Order 11,246 transferred the functions previously exercised by the President's Committee on Equal Employment Opportunity to the Secretary of Labor, who in turn vested those functions in the OFCC. 30 Fed. Reg. 13,441 (Oct. 22, 1965). OFCC's regulations, which prescribe the appropriate form of contractual language and provide various enforcement details, are published in part 1-12.8 of 41 C.F.R.

[3] Hearings on S. 2515 *et al.* Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 81 (1971).

[4] Many of these background facts are taken from the opinion in Local 189 v. United States, 416 F.2d 980, 984 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), in which the court of appeals affirmed the preliminary decree entered by the district court in March 1968. Meanwhile, the district court had entered a final decree. United States v. Local 189, 301 F. Supp. 906 (E.D. La. 1969).

[5] This local was later merged with the all-white locals.

[6] These had generally been the more menial, lower-paying jobs.

transfer into any line of progression in the Production Department were reduced to those of "employees working in the line who were hired at approximately the same time" as the AC applying for the transfer. (A. 4-5, 95)

Later in 1969, five black employees, respondents here, filed charges of racial discrimination against Scott at the EEOC. That agency took no action and at respondents' request issued a "right-to-sue" letter in May 1971.

This action followed. Respondents represent a class consisting of all black employees at the mill, of which there were 800 by the time of trial. They challenged the Memorandum as incorrectly conceived and contended further that it was inadequately implemented.[7]

After an extensive trial, the district court ruled against respondents on virtually every point. The court of appeals reversed on most of these points.[8] It overruled the district court's finding that the Memorandum was adequately understood by ACs and was correctly administered by Scott. It said, however, that this was "not . . . of decisive importance" because "even if correctly administered, the Memorandum would not have gone far enough to obviate further remedies . . . ." (A. 18) Critically, in addition to holding that other remedies were needed, the court of appeals also held that as a matter of law OFCC's involvement is not a reason to deny back pay to the plaintiff class. (A. 65)

[7] Respondents also challenged Scott's practices governing advancement to salaried supervisory positions as well as its educational and testing requirements for transfer into the Maintenance Department; the Memorandum did not address these questions.

[8] The EEOC appeared as amicus curiae, in support of respondents, in the court of appeals. (A. 1-2 n.3)

REASONS FOR GRANTING THE WRIT

Scott's position, though of profound and widespread importance in the administration of equal employment law, may be narrowly stated: Where a Federal agency has insisted that an employer adopt certain specific promotion and transfer rules in order to eliminate present effects of discriminatory employment practices the employer no longer follows, a district court, in a Title VII suit in which the new rules are successfully challenged, should be permitted to consider the Government involvement in passing upon a claim for class-wide back pay. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), held that the goal of speedily eradicating racial discrimination in employment is well served if courts normally award back pay, but this Court also held that in some cases an award need not be made, so long as the reasons would not frustrate the central statutory purposes of Title VII. The court of appeals held that Government sponsorship of the very rules that are held not to comply with Title VII is not such a case. Precisely the opposite is true. The court of appeals' holding would sharply reduce employers' incentive to follow, without litigation, Government-proposed remedies—directly contrary to the principle of *Albemarle.*

At the outset, we should make clear the arguments Scott is *not* making. First, Scott is not asserting that an employer who modified rules at the behest of the Government may never be required to change them *prospectively.* Second, Scott is not asserting that the Government action absolves the employer of back pay liability for periods *prior* to the action. Third, Scott is not asserting that Government action automatically precludes the imposition of back pay; instead, Scott challenges the court of appeals' holding that Govern-

ment action is totally irrelevant to whether back pay is awarded. Fourth, Scott is not asserting that Government action precludes an award of back pay to individuals who show that through no fault of theirs they could not benefit from the action.

There can be no doubt of the importance of the issue here presented. Conciliation of claims is the primary mechanism for enforcement of the Nation's equal employment laws and policies:

> (a) Former Undersecretary of Labor Silberman summarized the OFCC voluntary-compliance program as follows:
>
> "The threat of being declared a nonresponsive bidder, of being cancelled or debarred, is a powerful inducement to compliance . . . . We have found that the great majority of contractors have been willing to take all necessary steps to avoid these drastic sanctions." Hearings, *supra* n.3 at 79.[9]
>
> (b) The conciliation program is equally important to the EEOC. In 1971, the then-Chairman expressed disappointment that only half of the over 81,000 charges the Commission had received since 1965 had been settled by conciliation.[10] Yet that record reflects nearly 40,000 settlements—clearly a major element of equal employment opportunity enforcement.

[9] *See also* Note, *Civil Rights: Private Cause of Action Exists Under Title VII Notwithstanding EEOC Determination of No Reasonable Cause*, 1971 Duke L.J. 467, 477 (1971).

[10] Testimony of William H. Brown, reprinted in Legislative History of the Equal Employment Opportunity Act of 1972; Committee Print of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 930 (1972).

> (c) Other Federal agencies also have equal employment concerns. The Federal Communications Commission, for instance, has already adopted regulations explicitly dealing with the employment policies of its regulatees, and ratemaking agencies must now consider the consequences of equal employment issues as they affect the setting of rates.[11]

When Government agencies claim that employers' neutral seniority systems do not adequately eliminate the continuing effects of past discrimination, employers know that they must engage in "affirmative action" to erase those continuing effects. But there are few bright lines or rules that show what must be done at a given plant, mill or office to expedite the movement of black employees to their "rightful place." Moreover, as the court of appeals said in this very case, the rightful place theory is "an equitable accommodation" between countervailing interests. (A. 8)

It is obviously of public importance, in these circumstances, that employers be encouraged to reach a prompt "settlement" with the enforcement agency, rather than to litigate and have a court fashion, much later, the precise relief which best suits the situation at hand.

This conclusion also follows from this Court's holding in *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 417, that the availability of back pay relief provides the "incentive to shun practices of dubious legality"

[11] NAACP v. FPC, 48 L.Ed.2d 289 (1976). Those subject to rate regulation are precluded from attempting to pass on to their customers back pay awards based on findings of employment discrimination. *Id.* at 290.

and to eliminate, as far as possible and without protracted litigation, all traces of past discrimination.

Scott has done precisely what the law encourages. When the OFCC asserted in 1968 that Scott's prior elimination of discriminatory practices was not adequate to discharge its responsibilities, Scott accepted a new set of rules, tailored to the paper industry, *that OFCC put forward*. Scott had every reason to believe that it need not fear an award of class-wide back pay based on following these far-reaching rules, particularly after the new rules were ratified by the very class of employees for whose benefit they were expressly designed. Indeed, EEOC urges employers to adopt and implement effective affirmative action plans "before the Federal Government is called in, with the prospect of costly litigation, back pay awards, and court-imposed goals, timetables and changes in employment practices." [12]

But under the decision below these reasonable expectations are not to be fulfilled.

According to the court of appeals, "the question is whether Scott has done enough." The court held that "enough" under Title VII means "everything that is possible . . . limited only by the most compelling business reasons." (A. 9) The court ruled that the plan set forth in the Memorandum was not a proper "equitable accommodation" between eliminating present effects of past discrimination and preserving safe and efficient operation of the mill. For example, in considering the seniority rule to apply when two ACs and a non-AC compete to fill a vacancy, the court acknowledged that "no system could be devised that was totally devoid of eccentricity" but said it preferred the approach suggested by respondents—although that approach was "not without its peculiarities"—to the approach followed by Scott under the Memorandum. (A. 24) Similarly, the Memorandum allows Scott to consider the qualifications of ACs seeking a transfer to a different type of job, as compared with non-ACs already in the job (pp. 5-6, *supra*), but the court of appeals ruled that different levels of education could not be considered even though they might be pertinent to the issue of qualifications. (A. 25-26, 28, 39-40)

[12] EEOC, "Affirmative Action and Equal Employment—A guidebook for employers" at p. 12 (1974).

Of critical importance is the fact that the court of appeals did not rule merely that Scott must change its transfer and promotion rules prospectively; it went on to hold that Scott is liable for class-wide back pay as a result of compliance with the unsatisfactory rules and that OFCC's responsibility for the formulation of these rules was completely immaterial to the back pay question. It is this latter point that Scott challenges in this Court. The court of appeals, by allowing the district court to accord no weight to the Government involvement, has misconstrued an important Federal statute and, more particularly, has applied this Court's decision in *Albemarle* in a seriously erroneous fashion.

Scott makes no claim that its "good faith" should be accepted as a defense. The point is instead that the OFCC (and black union) involvement at least "opens the door to equity." *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 422. It is permissible for a court, in its discretion, to deny back pay "for reasons which, if applied generally, would not frustrate the central

statutory purposes [of Title VII]," *id.* at 421.[13] Here a Federal agency charged with enforcing anti-discrimination laws has imposed a specific remedial plan to eliminate present effects of past discrimination, and those who had been subject to the past discrimination have knowingly and voluntarily consented to that plan. Even if it is later decided that more far-reaching changes should be made in work rules, it is Scott's position that, in *Albemarle's* words, the "central statutory purposes" of Title VII would not be frustrated if a district court were free to decide not to award back pay in such a case and that indeed the opposite is true.

Suppose that Scott had resisted the OFCC plan in 1968. It would have been open to OFCC to initiate enforcement proceedings or to refer the matter to the Department of Justice or the EEOC. Executive Order 11,246, Sec. 209. Such a step could have resulted in a court decree imposing the OFCC plan upon Scott. If so, it would be difficult to contend that the decree would be of no relevance in determining whether back pay should be awarded to the entire class of black employees—intended beneficiaries of the decree—for the period that postdated the decree if a court should later hold that the decree should be altered in a number of respects. Yet the holding below is that if the employer promptly accepts the Government-proposed plan, saving time and money for all, the plan is *immaterial* to the back pay question. It is difficult to conceive of a

[13] Similar issues are now before this Court in U.S. Steel Corp. v. Ford, No. 75-1475 and United Steelworkers of America v. Ford, No. 75-1478, petitions for certiorari filed April 13, 1976; ruling below: 520 F.2d 1043 (5th Cir. 1975).

ruling more likely to undermine non-litigative enforcement activity.

The position Scott advances here is supported, not undercut, by this Court's decision in *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974). There the Court held that "an individual does not forfeit his private cause of action [under Title VII] if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Id.* at 49. The Court said that "mere resort to the arbitral forum to enforce contractual rights" is not a waiver of the right to assert the same claims in a Federal court because Title VII rights may not be waived or bargained away "as part of the economic bargain struck with the employer." *Id.* at 52.

Here we are not dealing with a waiver or bargaining away of rights. The OFCC plan was not a trade-off in the give and take of collective bargaining. Instead, it was just the type of "voluntary settlement" by the class of black employees that *Alexander* expressly assumed would be permissible. *Id.* at 52. Nor is the OFCC plan asserted as a bar to any claim, nor as a bar to any remedy. The question here is what weight, if any, is to be accorded the OFCC and black union involvement in choosing the appropriate Title VII remedies. The court of appeals' answer was "none." In *Alexander,* this court indicated that the answer should vary with the facts of the case, but that "great weight" should be accorded the prior determination where it "gives full consideration to an employee's Title VII rights." 415 U.S. at 60, n.21. Where, as here, the employees' Title VII rights were

the sole focus of the agreement, that agreement, under *Alexander,* merits substantially more weight than the court of appeals chose to give it.

Finally, reversing the decision below on the ground advanced herein would profoundly affect the outcome of the case upon remand to the district court, whether or not the court of appeals' findings that Scott did not adequately communicate the terms of the Memorandum to affected employees and that it did not properly implement the Memorandum are allowed to stand.[14] Such profound effects flow inevitably from the opinion of the court below, which itself stated that "even if correctly administered, the Memorandum would not have gone far enough to obviate further remedies." (A. 18) Moreover, such matters as whether particular employees understood their rights and whether Scott properly implemented the Memorandum in specific situations might give rise to individual back pay claims in particular instances but not to back pay relief to the entire class (which includes many ACs who fully understood their rights and promptly exercised them).

[14] Scott vigorously disagrees with these appellate findings. As for communication, for example, the district court's finding in Scott's favor is based upon the express testimony of the president of the black union that the terms of the Memorandum were communicated to the AC in a series of individual interviews (A. 99-100); the court of appeals reversed this finding and relied on testimony by several ACs that they did not understand all of the Memorandum's terms.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN VANDERSTAR
JOHN R. BOLTON
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006
Tel: (202) 452-6072
Attorneys for Petitioner
Scott Paper Company

Of Counsel:

FRANK MCRIGHT
MCRIGHT & SIMS
508 Commerce Building
Mobile, Alabama 36601

NORMAN H. HEISMAN
JOHN E. ABODEELY
VERONICE A. HOLT
Scott Paper Company
Philadelphia, Pennsylvania

July 28, 1976